No. 5 Original

In the Supreme Court of the United States

OCTOBER TERM, 1943

THE STATE OF COLORADO, COMPLAINANT

v.

THE STATE OF KANSAS AND THE FINNEY COUNTY WATER USERS' ASSOCIATION, A CORPORATION, DEFENDANTS

MEMORANDUM FOR THE UNITED STATES, AMICUS CURIAE

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In paragraphs One and Two of the decree proposed by the Special Master it is provided, among other things, that each of the two States is "decreed to be the owner" of certain quantities of the waters of the Arkansas River. For the reasons subsequently stated, the United States suggests that the quoted language relating to the ownership of the waters be eliminated from the final form of the decree. This result could most simply be accomplished by the elimination of the words "the owner and" in the second lines of paragraphs One and Two of the proposed decree (pages 20 and 21 of the Report and Recommendation of the Special Master).

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The object of this portion of the proposed decree is to effect an equitable apportionment of the waters of the Arkansas River between the States of Colorado and Kansas. The accomplishment of that purpose requires only an apportionment of the right to use the waters; it does not necessitate a finding or declaration of ownership. The Conclusions of Law submitted by the Special Master apparently recognize that fact and contain no conclusion regarding ownership.

In the interstate cases before this Court, in which decrees of apportionment of waters have been made, the Court has never included language of ownership, but has, instead, merely used the language of right to or restraint on diversion or release of waters. *Wyoming* v. *Colorado*, 260 U. S. 1; *Wisconsin* v. *Illinois*, 281 U. S. 696; *New Jersey* v. *New York*, 283 U. S. 805. Also, in none of the compacts concluded among states for the apportionment of waters or their use is there any language relating to the ownership of waters.[1] The characteristic language of those compacts is, in substance, that their purposes are the apportionment of the waters and that the waters or their use are merely apportioned or divided in

[1] In one negotiated compact there was a declaration that the waters "are the properties of the States within which they originate and flow." Proposed Yellowstone River Compact between the States of Wyoming and Montana, 1935. This proposed compact was not ratified by the legislature of either State or approved by the Congress.

the manner specified. La Plata River Compact, Art. II, Act of January 29, 1925, c. 110, 43 Stat. 796; South Platte River Compact, Arts. III, IV, Act of March 8, 1926, c. 46, 44 Stat. 195; Colorado River Compact, Arts. I, III (a), III (f), General Laws of California, 1931, Act 1490, Vol. 1, p. 669, approved, but not quoted, by Congress in Act of December 21, 1928, c. 42, sec. 13, 45 Stat. 1057, 1064; Rio Grande River Compact, Preamble, Arts. III, IV, Act of May 31, 1939, c. 155, 53 Stat. 785; Republican River Compact, Arts. I, III, IV, XI, Act of May 26, 1943, c. 104, Public No. 60, 78th Cong., 1st Sess.[2]

There is nothing peculiar to the present case which requires or justifies deviation from the pattern already set in decrees and compacts. While Colorado's bill of complaint alleges ownership by her of the waters of the Arkansas River above the Colorado-Kansas state-line (Bill of Complaint, paragraphs Fifth, Sixth, Seventh, Fourteenth, and Nineteenth) and these allegations have been put in issue by the answer of Kansas

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[2] These are all the presently effective compacts involving an apportionment of interstate waters. National Resources Planning Board Technical Paper Number 5, "Interstate Water Compacts, 1785 to 1941," contains a convenient collection of all interstate water compacts, effective and not effective, to and including 1941. None of the ineffective compacts, other than that mentioned in footnote 1, *supra*, contains language materially variant from that of the compacts mentioned in the text.

(Separate Answer of the State of Kansas, paragraphs Fifth, Sixth, Seventh, Fourteenth, and Nineteenth), the determination of such an issue of law is not essential to the decision of this controversy. Indeed, Colorado itself now takes exception to the Special Master's inclusion of language relating to state ownership in the proposed decree. Colorado's Exceptions to the Report of the Special Master, paragraph VIII.

Of special concern to the United States is the fact that if the final decree contains language relating to state ownership of these waters, which are nonnavigable (Proposed Finding of Fact number Second, Report and Recommendations of the Special Master, p. 4), it might prejudge an issue of vital importance to the Government which is squarely raised and as yet undecided in *Nebraska v. Wyoming and Colorado, United States, Intervenor*, No. 7, Original, October Term, 1943. There the intervention of the United States specifically raises the question of federal as against state ownership of the unappropriated waters of nonnavigable streams. See the United States Petition of Intervention and the answers of the three States thereto. The question has been extensively argued by all parties before the Special Master in that case, who now has the matter under consideration.

In these circumstances it is suggested that the inclusion of language relating to state ownership

in the decree in the instant case is not necessary and should be avoided in view of the pendency of the problem in *Nebraska* v. *Wyoming*, No. 7, Original, October Term, 1943.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

SEPTEMBER, 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943